

Supreme Court, U.S.  
FILED

05-750 DEC 8 - 2005

**In The OFFICE OF THE CLERK**

Supreme Court of the United States

SHAWN MARCUS CUMMINGS.

*Petitioner.*

v.

## THE STATE OF TEXAS.

*Respondent.*

**On Petition For Writ Of Certiorari  
To The Court Of Appeals,  
Sixth Appellate District Of Texas**

**PETITION FOR WRIT OF CERTIORARI**

HOUGH-LEWIS DUNN  
- *Counsel of Record*  
201 E. Methvin St., Suite 102  
P.O. Box 2226  
Longview, TX 75606  
Tel. 903-757-6711

## **QUESTION PRESENTED FOR REVIEW**

*Sole Question:* Was Petitioner denied Fourteenth Amendment Due Process of Law when the trial judge failed to consider a deferred adjudication before finding Petitioner guilty and sentencing Petitioner?

## **PARTIES TO THE PROCEEDING**

Petitioner is Shawn Marcus Cummings, 8670 FM 1649, Gilmer, TX 75645, represented by Hough-Lewis Dunn, 201 E. Methvin Street, Suite 102, P.O. Box 2226, Longview, Texas 75606.

Respondent is the State of Texas, represented by Hon. Greg Abbott, Attorney General of Texas, Office of the Attorney General of the State of Texas, 209 West 14th Street, Price Daniel Sr. Building, Austin, Texas 78701.

Respondent was represented in the Court below by Hon. William Jennings, Criminal District Attorney of Gregg County, Gregg County Courthouse, 100 East Methvin Street, Third Floor Suite 333, Longview, Texas 75601.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
STATEMENT OF JURISDICTION .....	1
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED.....	2
STATEMENT OF THE CASE .....	2
REASONS FOR REVIEW .....	5
CONCLUSION.....	14

## APPENDIX

A. Opinion of the Court of Appeals, Sixth Appel- late District of Texas.....	App. 1
B. Judgment of the Trial Court, May 21, 2004.....	App. 10
C. Notice From the Court of Criminal Appeals of Texas Denying Petition for Discretionary Re- view .....	App. 15
D. Texas Statutes and Rules .....	App. 16
E. Excerpts from Reporter's Record .....	App. 19

## TABLE OF AUTHORITIES

	Page
<b>CASES:</b>	
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	8, 9
<i>Cottingham v. State</i> , 424 S.E.2d 794 (Ga. App. 1992).....	12
<i>Cummings v. State</i> , 163 S.W.3d 772 (Tex. App. – Texarkana, 2005, pet. ref'd).....	3
<i>Davis v. State</i> , 125 S.W.3d 734 (Tex. App. – Texarkana, 2003, no pet.).....	3, 7
<i>Dillehey v. State</i> , 815 S.W.2d 623 (Tex. Crim. App. 1991).....	7
<i>Erie Railroad Company v. Purdy</i> , 185 U.S. 148 (1902).....	4
<i>Ex parte Brown</i> , 158 S.W.3d 449 (Tex. Crim. App. 2005).....	8
<i>Gagnon v. Scarpelli</i> , 411 U.S. 778 (1973).....	8
<i>Hayes v. Williams</i> , 341 F. Supp. 182 (S.D.Tex. 1972) .....	10
<i>Jackson v. State</i> , 535 S.E.2d 818 (Ga. App. 2000).....	12
<i>Johnson v. United States</i> , 520 U.S. 461 (1997).....	8
<i>Jones v. State</i> , 431 S.E.2d 136 (Ga. App. 1993).....	12
<i>McNew v. State</i> , 608 S.W.2d 166 (Tex. Crim. App. 1978).....	7
<i>Mendez v. State</i> , 138 S.W.3d 334 (Tex. Crim. App. 2004).....	8, 9
<i>People v. Johnson</i> , 285 P.2d 74 (Cal. App. 3d 1955).....	11
<i>Richardson v. Ramirez</i> , 418 U.S. 24 (1974).....	11
<i>Rose, Warden v. Clark</i> , 478 U.S. 570 (1986) .....	8, 9

## TABLE OF AUTHORITIES – Continued

	Page
<i>Ryan v. State</i> , 791 A.2d 742 (Del. 2002).....	12
<i>State v. Kyte</i> , 874 S.W.2d 631 (Tenn. Crim. 1993) .....	13
<i>State v. McFadden</i> , 772 So.2d 1209 (Fla. 2000, reh. den.) .....	12
<i>Teixeira v. State</i> , 89 S.W.3d 190 (Tex. App. – Texarkana, 2002, pet. ref'd) .....	3, 7, 8
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927).....	8, 9
<i>Waddy v. Davis</i> , 445 F.2d 1 (5th Cir. 1971).....	10
<i>Whitfield v. Ohio</i> , 297 U.S. 431 (1936).....	4
<i>Wnek v. State</i> , 586 S.E.2d 428 (Ga. App. 2003).....	12

## CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. CONST. amend. II.....	7
U.S. CONST. amend XIV §1.....	2, 9
Fourteenth Amendment Due Process Clause.....	3, 4, 5, 7, 8
TEX. CONST. art. 1, §19 .....	2, 8
TEX. CONST. art. 6, §1 .....	7
ALA. CODE tit. 12, §12-23-5.....	10
ALA. CODE tit. 15, §15-22-50.....	10
ALASKA STAT. §12.55.080 .....	10
ALASKA STAT. §12.55.085(e) .....	10
ARIZ. REV. STAT. §13-901 .....	11
ARIZ. REV. STAT. §13-912 .....	11
ARK. STAT. ANN. §5-4-301.....	11
ARK. STAT. ANN. §§16-93-301-303 .....	11

## TABLE OF AUTHORITIES – Continued

	Page
CAL. PENAL CODE, §1203 .....	11
CAL. PENAL CODE, §1203.4(a).....	11
COLO. REV. STAT. §18-1.3-101 .....	11
COLO. REV. STAT. §18-1.3-102 .....	11
COLO. REV. STAT. §18-1.3-202 .....	11
CONN. GEN. STAT. §53-29(a) .....	11
CONN. GEN. STAT. §53-29(b) .....	11
CONN. GEN. STAT. §53a-30.....	11
CONN. GEN. STAT. §53a-33.....	11
CONN. GEN. STAT. §53a-34.....	11
DEL. CODE ANN. tit. 11, §4204(c)(1)-(3) .....	12
DEL. CODE ANN. tit. 11, §4218.....	12
FLA. STAT. ANN. §948.01(1) .....	12
GA. CODE ANN. §42-8-34 .....	12
GA. CODE ANN. §42-8-60 .....	12
HAW. PENAL CODE §706-620 .....	12
HAW. PENAL CODE §853-1 .....	12
R.I. GEN. LAWS, tit. 12, §12-19-8 .....	13
R.I. GEN. LAWS, tit. 12, §12-19-19 .....	13
TENN. CODE ANN. §40-35-303 .....	13
TENN. CODE ANN. §40-35-313 .....	13
TEX. CODE CRIM. PROC. art. 1.04 .....	8-9
TEX. CODE CRIM. PROC. art. 26.13.....	5
TEX. CODE CRIM. PROC. art. 26.13(a) .....	5

## TABLE OF AUTHORITIES – Continued

	Page
TEX. CODE CRIM. PROC. art. 35.12(2) .....	7
TEX. CODE CRIM. PROC. art. 35.16(a)(2).....	7
TEX. CODE CRIM. PROC. art. 35.19.....	7
TEX. CODE CRIM. PROC. art. 42.12, §3 .....	4, 6
TEX. CODE CRIM. PROC. art. 42.12, §3d(a).....	7
TEX. CODE CRIM. PROC. art. 42.12, §5 .....	2, 4, 6, 7
TEX. CODE CRIM. PROC. art. 42.12, §5(c).....	4, 10
TEX. GOVT. CODE, §141.001(a)(4) .....	7
TEX. PENAL CODE, §12.34 .....	2
TEX. PENAL CODE, §31.03 .....	2
TEX. PENAL CODE, §46.04 .....	7
WIS. STAT. ANN. §973.015.....	13
WIS. STAT. ANN. §973.09.....	13
 RULES:	
TEX. R. APP. P. 33.1(a).....	3

**PETITION FOR WRIT OF CERTIORARI**

Shawn Marcus Cummings, Petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals, Sixth Appellate District of Texas at Texarkana, entered in the above-entitled case on March 23, 2005.

---

**OPINIONS BELOW**

The opinion of the Court of Appeals, Sixth Appellate District of Texas at Texarkana, entered on March 23, 2005, of which review is requested in this petition, is reported at 163 S.W.3d 772, and is reprinted in the separate Appendix to this petition (*infra*, App. 1-App. 9).

The Court of Criminal Appeals of Texas denied a petition for discretionary review without written opinion in Cause No. PD-0730-05, on September 14, 2005, and the Notice of that denial is reprinted in the separate Appendix to this petition (*infra*, App. 15).

---

**STATEMENT OF JURISDICTION**

The judgment of the Court below (*infra*, App. 1-App. 9) was entered on March 23, 2005. Rehearing was timely sought and overruled without written opinion on April 13, 2005. A petition for discretionary review was filed in the Court of Criminal Appeals of Texas but was denied on September 14, 2005, without written opinion (*infra*, App. 15). No motion for rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1957(a).

---

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, §1.

Article 1, §19 of the Texas Constitution, provides, in relevant part: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunity, or in any manner disfranchised, except by due course of the law of the land." TEX. CONST. art. 1, §19.

The relevant provisions of the Texas Code of Criminal Procedure, the Texas Penal Code, and the Texas Rules of Appellate Procedure are reproduced in the separate Appendix to this petition (*infra*, App. 16-App. 18).

---

### STATEMENT OF THE CASE

Petitioner entered an open plea of guilty to the trial court to the third degree felony of theft.<sup>1</sup> There was no plea bargain concerning punishment. Having no prior felony convictions, Petitioner was eligible under Texas law for a sentence of deferred adjudication.<sup>2</sup> However, the trial court never considered that possibility. Instead, the trial court proceeded to find Petitioner guilty and sentenced him to seven years imprisonment (*infra*, App. 11-App. 14).

---

<sup>1</sup> TEX. PENAL CODE, §31.03 (*infra*, App. 17-App. 18); TEX. PENAL CODE, §12.34 (*infra*, App. 17).

<sup>2</sup> TEX. CODE CRIM. PROC. Art. 42.12, §5 (*infra*, App. 16).

On appeal to the Court of Appeals, Sixth Appellate District of Texas, sitting at Texarkana, Petitioner contended that the trial court committed a clear legal error, violating his federal Due Process rights. In its opinion dated March 23, 2005, *Cummings v. State*, 163 S.W.3d 772 (Tex. App. – Texarkana, 2005, pet. ref'd), that Court ruled (1) that Petitioner had not preserved that error at trial but then (2) proceeded to analyze the error and held that no error was committed (*infra*, App. 8). Although Petitioner sought review of that opinion from Texas' court of last resort for criminal matters, the Court of Criminal Appeals of Texas denied review without written opinion (*infra*, App. 15). Therefore, the Court of Appeals, Sixth Appellate District of Texas at Texarkana, has decided a matter that implicates Fourteenth Amendment Due Process of Law.

Initially, the Court below held that Petitioner waived error because there was no objection at trial and no mention of the error in Petitioner's motion for new trial. The court cited to TEX. R. APP. P. 33.1(a), and to *Teixeira v. State*, 89 S.W.3d 190, 192 (Tex. App. – Texarkana, 2002, pet. ref'd) for the principle that, in order to preserve error on appeal that the trial court failed to consider the full range of punishment, the error, if any, had to be raised at the trial court level. (See, *infra*, App. 18.)

However, instead of summarily affirming the trial court's judgment, the court below analyzed the record and concluded that there was no error committed by the trial court. In doing so, the court below expressly relied upon *Davis v. State*, 125 S.W.3d 734 (Tex. App. – Texarkana, 2003, no pet.), which holds: "A trial court's arbitrary refusal to consider the entire range of punishment available for the offense does constitute a denial of due process (cit. omitted)." *Id.*, at 736.

Since the error was addressed by the Court below, the error is properly before this Court for consideration. *Whitfield v. Ohio*, 297 U.S. 431, 436 (1936); *Erie Railroad Company v. Purdy*, 185 U.S. 148, 152-153 (1902). Moreover, under Fourteenth Amendment Due Process analysis, (this Brief, *infra*, pp. 8-9) this Court's jurisdiction is properly invoked.

Petitioner was denied Fourteenth Amendment Due Process of Law because the trial judge categorically refused to consider the complete range of punishment. In Texas there are two types of adult community supervision or probation established under TEX. CODE CRIM. PROC., art. 42.12: adjudicated community supervision under §3 of that statute and deferred adjudication community supervision under §5 (*infra*, App. 16). Even if a defendant successfully completes the term of community supervision under §3 without revocation and incarceration, he or she still carries the stigma of a conviction and the disabilities associated with that conviction. That is not the case with deferred adjudication. Upon successful completion of community supervision under §5 deferred adjudication, "the judge shall dismiss the proceedings against the defendant and discharge him . . . *a dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense . . .*" TEX. CODE CRIM. PROC. art. 42.12, §5(c) (emphasis added), (*infra*, App. 17).

The Court below nowhere in its opinion hinted at the qualitative, substantial, difference in the consequences of the successful completion of those two types of adult community supervision. It reasoned that, because deferred adjudication was "a form of community supervision, it is not necessary for a trial court to explain all possible forms